No. 80-1558

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In the Supreme Court of the United States

OCTOBER TERM, 1980

LEBEOUF BROTHERS TOWING COMPANY, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner LeBeouf Brothers Towing Company, the owner of a barge from which oil was spilled, contends that it is not liable to the United States for clean-up costs because the tugboat crewman who caused the spill is a "third party" under 33 U.S.C. (Supp. III) 1321(f)(1).

1. The United States instituted this action under the Federal Water Pollution Control Act to recover $38,689 for costs incurred by the United States Coast Guard in cleaning up oil discharged from LeBeouf Brothers' barge, the LBT 4. LeBeouf Brothers is engaged in the business of transporting petroleum products by barge, and it contracts with independent tugboat operators to tow its non-self-propelled barges (Pet. App. A-2, C-2).

In the present case, LeBeouf Brothers contracted with Bayou Marine Corporation, a marine broker in the business of arranging towage contracts for its clients, to procure

a tug and crew to tow the LBT 4. Bayou secured the services of the M/V HARDING R, a tug owned and operated by Barracuda Marine Corporation. Petitioner designated the itinerary for the barge and the times and places for it to be loaded and unloaded; the navigation of the vessels and the loading and unloading of cargoes were to be performed by the crew of the tug (Pet. App. A-2, C-2).

On March 20, 1974, the M/V HARDING R and the LBT 4 were moored at Westwego, Louisiana, for the purpose of unloading a cargo of crude oil. In the course of transferring the cargo from the LBT 4 to shore, a crewman employed by Barracuda Marine aboard the HARDING R discharged approximately 60 barrels of crude oil into the Mississippi River. When no action was taken to remove the discharged oil, the Coast Guard employed an independent company to undertake the cleanup at a total cost of $38,689 (Pet. App. A-3, C-3).

2. Pursuant to Section 311(f)(1) and (n) of the Federal Water Pollution Control Act, 33 U.S.C. (& Supp. III) 1321(f)(1) and (n), the government filed suit in the United States District Court for the Eastern District of Louisiana to recover the clean-up costs from LeBeouf Brothers as the owner of the discharging vessel. In its defense, LeBeouf Brothers relied on 33 U.S.C. (Supp. III) 1321(f)(1)(D), which relieves the vessel owner of liability when the discharge is caused solely by an act or omission of a third party. The district court dismissed the government's claim against LeBeouf Brothers on the ground that the tug that caused the discharge was a third party within the meaning of 33 U.S.C. (Supp. III) 1321(f)(1)(D) (Pet. App. C-4 to C-8).

On appeal, the court of appeals reversed the judgment of the district court and remanded for further proceedings (Pet. App. A-1 to A-7; 621 F. 2d 787 (1980)). "Following the reasoning of the First Circuit" (Pet. App. A-6) in

Burgess v. *M/V TAMANO*, 564 F. 2d 964 (1977), cert. denied, 435 U.S. 941 (1978)), and looking to the other provisions of 33 U.S.C. (Supp. III) 1321(f)(1) and to the legislative history of the Act (Pet. App. A-6), the court of appeals concluded that the "third party defense in Section 1321(f)(1) must be narrowly interpreted" (Pet. App. A-6) and that a tug acting in the place of the barge owner is not a "third party" under that section. Accordingly, the court held that LeBeouf Brothers was not "protect[ed] * * * from liability for clean-up costs" by the third-party defense (*id.* at A-6).

3. The question raised by petitioners concerning the third-party defense in 33 U.S.C. (Supp. III) 1321(f)(1)(D) is also presented in *Hollywood Marine, Inc.* v. *United States*, petition for cert. pending, No. 80-1160 (filed Jan. 12, 1981). In that case, the Fifth Circuit, relying on its decision here, summarily reversed the judgment of the district court sustaining a barge owner's assertion of the third-party defense with respect to a tug that caused an oil spill while in the employ of the barge owner. For the reasons stated in our brief in opposition in *Hollywood Marine*, a copy of which is being provided to counsel for petitioners in the instant case, the court of appeals' construction of the third-party defense is correct and does not conflict with the decision of any other circuit. Hence, further review is unwarranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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DOJ-1981-05